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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1965

No. 860

IN THE MATTER OF THE WOODMAR REALTY COMPANY, a Corporation,

Debtor,

WOODMAR REALTY COMPANY,

Petitioner,

vs.

WALTER A. McLEAN, Trustee, ET AL.,

Respondents.

In Proceedings for the Reorganization of a Corporation.

* * * * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(Orders And Opinions Of The United States District Court Are Appended.)

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INDEX TO PETITION.

PAGE

Opinions Below 2

Grounds for Invoking This Court's Jurisdiction 3

Questions Presented for Review 4

Constitutional Provisions, Rules, etc. Involved 6

Concise Statement of the Case 8

Argument 15

I.

Confronted with a simple situation where no ground for dismissal of your Petitioner's timely appeal existed, the Court of Appeals accepted a statement by the District Court in an opinion accompanying the order appealed from as reason for refusing to perform its statutory judicial function and denying your Petitioner its right of appeal as granted by Congress .. 15

A. The District Court had no right to render a final, unappealable, decision on a question of law 15

B. The order and opinion of April 28, 1964, constituted an erroneous decision of law. No evidence was offered or heard. The District Court's views on matters of law could not and cannot preclude a review of that decision on the merits 17

C. The Court of Appeals for the Seventh Circuit has placed an unwarranted interpretation on the right to be heard on appeal granted by the 1938 Chandler Act, 11 U.S.C. 47(a) and 606, in conflict with decisions of other circuits 19

II

The case of In Re: V.I.D., Inc., 7 C.A. 1955, 226 Fed. (2d) 113, is not authority for denying your petitioner its statutory right of appeal 20

INDEX TO APPENDIX

District Court's Opinion on Vacating Settlements 1a
District Court's Order Vacating Settlements 16a
District Court's Opinion on Reimbursement for Costs .. 17a
District Court's Order Reimbursing Lien Claimants .. 19a

TABLE OF CASES

Albin v. Cowing Pressure Relieving Joint Co., et al. (1942) 317 U.S. 211, 212, 63 S. Ct. 170, 171 17
Gleason v. Carr, (9 Cir. 1955) 219 F. 2d 64 20
Horowitz v. Kaplan, (1 Cir. 1951) 193 F. 2d 64 20
In the Matter of the Woodmar Realty Company (7 Cir. 1957) 241 F. 2d 768 ..... 5, 11
In re Hopkins, (D.C.R.I. 1926) 15 F. 2d 206 11
In re Povill, (2 Cir. 1939) 105 F. 2d 157 11
In re South State Street Bldg. Corp., (7 Cir. 1944) 140 F. 2d 363 20
In Re: V.I.D., Inc., (7 Cir. 1955) 226 F. 2d 113 ..... 3, 20
In re Witherbee, (1 Cir. 1913) 202 F. 896 11

In re Woodmar Realty Company, (7 Cir. 1960) 284 F. 2d 815 ..... 5, 12
Lutcher & Moore Lumber Co. v. Knight, (1910) 217 U.S. 257, 30 S. Ct. 505 17
Parissi v. Telechron, Inc. and General Electric, (1955) 349 U.S. 46, 75 S. Ct. 577 17
Societe Internationale etc. v. Rogers, (1958) 357 U.S. 197, 78 S. Ct. 1087 18
Syracuse Broadcasting Corporation v. Newhouse, (2 Cir. 1959) 271 F. 2d 910 18
Young v. Higbee Co., (1945) 324 U.S. 204, 65 S. Ct. 594 19

CONSTITUTION, STATUTES, RULES.

11 U.S.C.A., § 47 ..... 6, 17
11 U.S.C.A.,§ 47 (c) 6
28 U.S.C. 1254 (1) 3
11 U.S.C.A., § 521 ..... 7, 17
11 U.S.C. §§ 526-533 8
11 U.S.C.A., § 606 ..... 4, 7, 17, 19, 20
11 U.S.C. § 636 (2) 8

TEXTS.

16A C.J.S., Constitutional Law, § 567, p. 541 18

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(Orders And Opinions Of The United States District Court Are Appended.)

To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

The above named Petitioner, as the Debtor Corporation in a 24 year old Chapter X reorganization, respectfully

petitions this Court to issue its writ of certiorari to said Court of Appeals to review that Court's judgment and order dismissing an appeal from orders of the United States District Court for the Northern District of Indiana, Hammond Division, vacating settlement stipulations between your Petitioner and 102 separate lien claimants and reimbursing 2 lien claimants for substantial costs adjudicated against them in a prior appeal. The dismissal of the appeal occurred without a hearing on the merits although all procedural steps were taken within the time provided for by law.

OPINIONS BELOW.

The Court of Appeals did not render an opinion. Its per curiam order of September 23, 1964, dismissing your Petitioner's appeal, is as follows:

> "This matter comes before the Court on the verified motion of Walter A. McLean, Trustee, appellee in this matter, to dismiss appeal, together with brief in support thereof; answer of Woodmar Realty Company, a corporation, to said motion, with brief in support of said answer; and the appellee's reply to appellant's answer to appellee's motion to dismiss, with brief in support thereof.
>
> On consideration whereof, It Is Ordered and adjudged by this Court that this appeal from orders of the United States District Court for the Northern District of Indiana, Hammond Division, entered therein on April 28, 1964, be, and the same is hereby Dismissed, with costs, it appearing to the Court that

the appellant is no longer a party in interest and lacks standing to appeal. (*In Re*: *V.I.D. Inc.*, 7 C.A. 1955, 226 Fed. (2d) 113).

All other pending motions filed in this appeal are thus rendered moot and need not be decided."

The opinion and order of the District Court, dated April 28, 1964, vacating the settlement stipulations between your Petitioner and the 102 lien claimants is set out as Appendix "A", infra, at pages 1a through 16a. The opinion and order reimbursing the 2 lien claimants for appeal costs adjudicated against them, also entered under date of April 28, 1964, is set out as Appendix "B", infra, at pages 17a through 23a.

GROUNDS FOR INVOKING THIS COURT'S JURISDICTION.

This Court's general jurisdiction to review final judgments of the Courts of Appeals in reorganization and bankruptcy cases is involved.

The Court of Appeals for the Seventh Circuit rendered its order and judgment dismissing the appeal on September 23, 1964, following which a timely Petition for Rehearing by this Petitioner-Debtor was filed. The Petition for Rehearing was denied by an order entered on October 14, 1964. Within the 90 days allowed for the filing of a Petition for Writ of Certiorari, and on January 11, 1965, the time was extended by order entered by Mr. Justice Tom C. Clark to and including January 27, 1965.

This Court's jurisdiction is based upon 11 U.S.C. (Bankruptcy), § 47 (c), and 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

(1) Whether or not the appellant Woodmar Realty Company, as the corporate debtor in a 24 year-old reorganization, is entitled to a hearing on the merits in the Court of Appeals for the Seventh Circuit on an appeal from an order entered by a District Court vacating and setting aside 102 settlement stipulations entered into, with prior court authority and prior court approval under mandate of the Court of Appeals, by the Woodmar Realty Company and 102 lien claimants.

(2) Whether or not the statutory right of a debtor corporation in a corporate reorganization to be heard in the District Court includes a right to be heard on the merits on appeal. Section 206 of the Bankruptcy Act, 11 U.S.C.A. §606, provides that "*The debtor * * * shall have the right to be heard on all matters arising in a proceeding under this chapter.*" Your petitioner, the Debtor corporation, was heard in the District Court as a party on the matter of the vacating of 102 settlement stipulations between it and 102 lien claimants. *Being a party to the 102 settlement stipulations* in the District Court, it has the right of appeal from an order vacating its settlement stipulations. The order of dismissal denied this right.

(3) Whether the law of the case, as established by the Court of Appeals in two earlier appeals in the same proceedings, is binding upon the Court of Appeals in subsequent proceedings in the same case on the same subject matter. The Trustee's identical motion to dismiss on the ground that the Woodmar Realty Company was not a "party in interest" was denied by the Court of Appeals in an earlier

appeal. **In the Matter of the Woodmar Realty Company** (1957), 241 F. 2d 768. The right of the Debtor, Woodmar Realty Company, to either litigate or settle lien claims was established as the law of the case in a second appeal. **In the Matter of the Woodmar Realty Company** (1960), 284 F. 2d 815. The mandate of the Court of Appeals, directed the lower court to approve the 102 settlement stipulations.

(4) Whether or not the Court of Appeals for the Seventh Circuit has authority, either by statute or case law, to dismiss an appeal without a hearing on the merits, where the appeal is taken by a party whose rights have been materially affected in a direct pecuniary way by the order complained of on appeal and where the party seeking to appeal has complied with all of the procedural statutes and rules governing its appeal. The *only parties* interested in the debtor's assets, consisting *only* of $465,290 in cash, are special improvement bond (lien) claimants and the Woodmar Realty Company and its stockholders. 102 of the 300 lien claimants settled for a combined total sum of $40,272.50. The Trustee proposes to distribute $116,762.39 to the 102 claimants. The total proposed by the Trustee to pay all 300 lien claimants is $367,469.39. By vacating the 102 settlements the estate and, ultimately, the Woodmar Realty Company, loses $76,489.89.

CONSTITUTIONAL PROVISIONS, RULES, ETC., INVOLVED.

Congress has established the jurisdiction **and duty** of the Court of Appeals to review decisions of the District Courts in bankruptcy matters by express provision of the Bankruptcy Act, Section Twenty-Four, 11 U.S.C.A. § 47:

> **"§ 47. Jurisdiction of appellate courts.**
>
> (a) The United States courts of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, **are invested with appellate jurisdiction** from the several courts of bankruptcy in their respective jurisdictions *in proceedings in bankruptcy*, either *interlocutory or final*, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: Provided, however, that the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law only: And provided, further, that when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.
>
> (b) Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.
>
> (c) The Supreme Court of the United States is vested with jurisdiction to review judgments, decrees, and orders of the United States courts of appeals in proceeding under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted. As amended May 27, 1926, c. 406, § 9, 44 Stat. 664; June 7, 1934, c. 426, 48 Stat. 926; June 22, 1938, c. 575, § 1, 52 Stat. 854; June 25, 1948, c. 646, § 32, 62 Stat. 991; July 7, 1952, c. 579, § 9, 66 Stat. 424." (Our emphasis).

11 U.S.C. 47

As the Debtor in a Chapter X reorganization your Petitioner's standing to appeal is derived from Section 206 of the Bankruptcy Act, 11 U.S.C.A. § 606, which provides that:

> "Sec. 606. **The debtor,** the indenture trustees, and any creditor or stockholder of the debtor **shall have the right to be heard on all matters arising in a proceeding under this chapter.** The judge may, for cause shown, permit a labor union or employees' association, representative of employees of the debtor, to be heard on the economic soundness of the plan affecting the interests of the employees."

The right granted by Congress is an unqualified right. The right to be heard in the District Court includes the right to be heard on appeal on the merits. The District Court does not have the right to render final determinations of law in rendering orders and judgments.

Congress, in passing the Chandler Act, made certain that the right of appeal was preserved by Section 121, 11 U.S.C.A., § 521:

> "§ 52[1]. **Appellate Jurisdiction.**
>
> Where not inconsistent with the provisions of this chapter, the jurisdiction of appellate courts shall be the same as in a bankruptcy proceeding. July 1, 1898, c. 541, § 121, as added June 22, 1938, C. 575, § 1, 52 Stat. 885."
>
> 11 U.S.C. 521

CONCISE STATEMENT OF CASE.

A concise statement for a 24 year old reorganization is most difficult.

The jurisdiction of the District Court for the Northern District of Indiana, Hammond Division, was invoked on January 13, 1941, by the filing of a creditor's petition under the Chandler Act (Chapter X of the Bankruptcy Act) for the purpose of the reorganization of your petitioner, an Indiana corporation, engaged in the real estate business in Hammond, Indiana (11 U.S.C.A. §526-533).

The creditor's petition was filed by four holders of City of Hammond municipal improvement bonds representative of alleged statutory lien rights upon certain of the real estate owned in fee simple by your petitioner, the Woodmar Realty Company. Your petitioner, the Woodmar Realty Company, as Debtor, appeared on January 24, 1941 and filed an answer consenting to reorganization under Chapter X.

A trustee in reorganization, Charles L. Surprise, was appointed by the District Court on January 21, 1941. An amended plan of reorganization was adopted on July 3, 1941, consented to by the six classes of reorganization creditors (including the stockholders) and confirmed by order of the District Court entered on November 22, 1941. The amended plan of reorganization, providing for the issuance of corporate stock in the reorganized corporation, was never consummated. By order entered on February 16, 1953, the amended plan of reorganization was discarded and an order entered pursuant to Section 636(2) of the Bankruptcy Act, 11 U.S.C.A. §636(2), adjudging your peti-

tioner bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of the Bankruptcy Act.

On January 13, 1941, your petitioner's assets consisted of 1540½ lots (both business and residential, improved with streets, sewers, sidewalks, and water mains) in Hammond, Indiana. The real estate was valued at $2,350,000 in the Trustee's Financial Report filed on March 20, 1941. During the first 10 years that the reorganization proceedings were pending, Trustee Charles L. Surprise sold all of the real estate in separate sales for the gross sum of $695,945.01. Real estate commissions, title costs, administrative expenses, including preliminary fees, totaled $216,993.58, leaving a cash balance on hand on March 22, 1951 of $491,988.56. That sum has now been reduced to $465,290.00.

During the first year that these proceedings were pending, the class one claims (general delinquent real estate taxes) and the class three claims ($300,000 in mortgage bonds secured by a trust deed) were compromised and paid pursuant to the terms of the reorganization plan through the conveyance to the indenture trustee of a portion of the Debtor's real estate. Your petitioner's assets were used for this purpose. In subsequent years, the class four claims (judgment creditors) and class five (unsecured creditors) were disposed of through the efforts of the Woodmar Realty Company. The only problem which is and has been confronting the District Court since at least April of 1951 has been the disposition of the class (2) two, or City of Hammond special improvement bond claims. There are 300 of these undisposed of.

The improvement bonds were not and are not the contractural obligations of the Woodmar Realty Company, but originally represented alleged statutory lien rights in its land

(and other lands). When the land of the Woodmar Realty Company was sold by the Trustee, free and clear of the liens, the liens, if any, represented by the outstanding municipal bonds were transferred to the proceeds of the sale. The trustee commingled the proceeds of the sales.

During the 24 years that these proceedings have been pending, approximately 300 separate Class 2 claims had been filed by the alleged owners and/or holders of various defaulted City of Hammond special improvement bonds issued prior to 1930. On November 22, 1941, the District Court ordered Trustee Surprise to file objections to the "Class 2" claims and cause hearings to be had on the issues thus formed. No objections to the "Class 2" claims were ever prepared or filed by the then Trustee, Charles L. Surprise, or his successor, respondent Walter A. McLean, Trustee, or any hearings had thereon.

Trustee Surprise, his then attorney, and other fiduciaries, secretly and pendente lite, purchased, either directly or indirectly, large numbers of the defaulted municipal improvement bonds which they then attempted to recover on from the cash assets in the possession of Trustee Surprise.

In April of 1951, the Woodmar Realty Company filed extensive objections and other pleadings in opposition to the distribution program of Trustee Surprise and the petitions of the fiduciaries seeking an allowance of $296,000 in fees out of the then net $491,988.56 cash balance. None of the fiduciaries objected to either the distribution plan or the fee petitions of each other. Following prolonged hearings, and on October 29, 1952, **the District Court ruled in favor of the Debtor, the Woodmar Realty Company.**

Instead of filing objections to the Class 2 claims, and on September 7, 1955, the present Trustee, Walter A. McLean,

filed a document entitled "Trustee's Final Report; Petition For the Determination of Amounts Due on Special Assessment Bonds and Coupons Constituting Secured Claims as Against Funds in This Matter and For an Order Directing Payment Thereof, Etc." Thereupon, the Debtor, Woodmar Realty Company filed written objections to the Trustee's Final Report, etc." and, with leave granted by the District Court, filed 274 separate sets of objections to 274 out of the 300 odd claims. (Subsequently, objections were filed to the remaining Class 2 claims.) **The issues formed on "The Amended Trustee's Final Report, etc." have not been determined.**

Respondent trustee, Walter A. McLean, and certain of the lien claimants filed motions to strike out the Woodmar Realty Company's objections on the ground that the Woodmar Realty Company was not a "party in interest". The District Court's order sustaining the motions was reversed on appeal to the Court of Appeals for the Seventh Circuit. *In the Matter of the Woodmar Realty Company, Debtor* (1957), 241 F. 2d 768. A motion to dismiss, identical to the motion granted by the Court of Appeals on September 23, 1964, was denied, the Court of Appeals stating, in pertinent part, as follows:

> "The bankrupt has been permitted to object to allowance of claims in cases where in the event of disallowance there would be a surplus left for the bankrupt. *In re Povill*, 2 Cir., 105 F. 2d 157; *In re Hopkins*, D.C.R.I., 15 F. 2d 206 (on petition to review); cf., *In re Witherbee*, 1 Cir., 202 F. 896. The bankrupt here has brought itself within this exception to the general rule. The bankrupt's interest in having claims in excess of $300,000 disallowed, in which event a substantial surplus would be available for the bankrupt, is obviously real, **and the conclusion is inescapable that under**

these circumstances the bankrupt is a 'party in interest'.'' (241 F. 2d 768, page 771)

On remand, one of the lien claims, Claim No. 441, was set down for trial. The Trustee neither filed pleadings nor did he attend the trial. Claim No. 441 and the Woodmar Realty Company's objections thereto, tried in July of 1957, is the only claim ever tried. The District Court handed down findings 4 years later, in 1961.

At the suggestion of the then Judge of the District Court, the Woodmar Realty Company filed a petition for authority to negotiate settlements. An order was entered on July 22, 1957, granting the Woodmar Realty Company and special improvement bondholders authority to enter into compromise negotiations, any compromise agreements to be subject to the approval of the court. This order was reconfirmed on August 30, 1957.

Pursuant to the orders so entered, the Woodmar Realty Company entered into settlement stipulations, filed of record, with 102 lien claimants. The Trustee filed a petition for instructions in connection therewith. Hearings were held in 1958 on the question of approval of the 102 settlement stipulations. Written notice was given all parties of record. No objections to the approval of the 102 settlement stipulations were filed or made. Notwithstanding the lack of objections, the District Judge, on January 16, 1960, entered an order denying approval of the 102 settlement stipulations. The Woodmar Realty Company, Debtor, appealed from this order. The order was reversed. *In re Woodmar Realty Company* (1960) 284 F. 2d 815. The Court of Appeals established the law of the case, in pertinent part, as follows:

> "'The balance of this depleted fund would become the property of Woodmar. The more that was allowed

the lien claimants, the less Woodmar would recover from its property. **The less that the claimants would receive, the more Woodmar would recover.**"

* * * * *

"The pending litigation was in reality between Woodmar and the lien holders. Whether it was litigated to a finish or settled, they were the ones who would ultimately be affected thereby. Such litigation was really an ordinary civil controversy. The parties, whether in litigating in the courtroom or in settling outside the courtroom, were engaged in an adversary activity and dealing at arms' length." (284 F. 2d 815, page 817)

Following remand, and on July 21, 1961, the District Court entered an order approving the 102 settlement stipulations. Notwithstanding the fact that the settlement stipulations so approved expressly provided the dismissal of the claim and immediate disbursement of the proceedings of the settlement to each of the 102 lien claimants, the Trustee failed and refused to carry out the settlement stipulations.

On September 6, 1962, 3 out of 102 lien claimants who had settled, served and filed a "Petition to Re-docket Three Claims." Following notice to the Woodmar Realty Company and oral argument held on February 28, 1964, the District Court, on April 28, 1964, entered orders with opinions vacating the 102 settlement stipulations and ordering the Trustee to reimburse Gardner and Phrommer for their appeal costs. The opinions and orders are printed in the appendix, infra.

Your petitioner, the Woodmar Realty Company, filed its notice of appeal in the District Court on May 28, 1964, paying the requisite "Designation of Contents of Record on Appeal". The record on appeal was duly filed on August 17, 1964 and the docket fee paid. **The record was filed in**

the Court of Appeals within the time allowed by the rules, as extended by order of the District Court. On or about August 22, 1964, Walter A. McLean, Trustee, filed a "Verified Motion to Dismiss on Appeal" on the sole ground that the Woodmar Realty Company was not a "party in interest". The Woodmar Realty Company, appellant, served and filed its verified answer. Appellee-trustee filed a reply. The appeal was dismissed on motion of the Trustee Walter A. McLean, on the sole ground that the Woodmar Realty Company was not a "party in interest".

ARGUMENT.

I.

Confronted With A Simple Situation Where No Ground For Dismissal Of Your Petitioner's Timely Appeal Existed, The Court Of Appeals Accepted A Statement By The District Court In An Opinion Accompanying The Order Appealed From As Reason For Refusing To Perform Its Statutory Judicial Function And Denying Your Petitioner Its Right Of Appeal As Granted By Congress.

A.

The District Court Had No Right To Render A Final, Unappealable, Decision On A Question Of Law.

It will be observed that the Woodmar Realty Company, as the Corporate Debtor, is a party to each of the 102 settlement stipulations. Each of the 102 contracting claimants is the only other party to the settlement stipulations. There were and are no "parties in interest" in the 24 year-old reorganization other than Woodmar Realty Company and lien claimants.

Each of the 102 settlement stipulations established a contract right belonging to the Woodmar Realty Company. Each of the 102 lien claimants has a contract right to have immediate disbursement out of the $465,290.00 in cash assets upon the dismissal of its claim. The 198 remaining lien claimants, who chose to have their lien claims adjudicated, did not object to immediate distribution in 1958 or at any time thereafter.

The settlement stipulations were formally approved by the District Judge on July 21, 1961, in obedience to the

express mandate of the Court of Appeals rendered on November 23, 1960, in the following language:

> "On Consideration Whereof, it is ordered and adjudged by this Court that the order of the said District Court filed therein on January 19, 1960, be, and the same is hereby, Reversed, with costs, and that this cause be, and the same is hereby, Remanded to the said District Court with instructions to enter an order approving the settlements and compromise agreements referred to in said order of January 19, 1960, for the reasons expressed in the opinion of this Court filed this day." (Mandate: *In the Matter of the Woodmar Realty Company*, 1960, 284 F. 2d. 815).

Because of the reversal, however, the District Judge made mere token compliance with the mandate by entering a short order of "approval". Both the District Judge and respondent trustee, Walter A. McLean, simply failed and refused to consummate the settlement stipulations in accordance with their express terms.

Because the settlement stipulations were not consummated, (through no fault of the Woodmar Realty Company or the lien claimants), 3 of the lien claimants, on September 6, 1962, filed a Petition to Redocket Their Claims. On January 22, 1964, 5 additional lien claimants served and filed a "Petition To Vacate And Set Aside Their Compromise Settlements Or Their Claims And To Redocket And Approve" their claims. Your Petitioner, the Woodmar Realty Company, was the adverse party noticed in. No evidence was offered or heard on February 28, 1964. Thereafter, and on April 28, 1964, the District Court vacated and set aside the 102 settlement stipulations rendering an opinion setting forth its alleged reasons for this unusual and unprecedented action. (Page 1a of the Appendix, *infra*.) The Woodmar Realty Company's appeal was dismissed.

B.

The Order And Opinion Of April 28, 1964, Constituted An Erroneous Decision Of Law. No Evidence Was Offered Or Heard. The District Court's Views On Matters Of Law Could Not And Cannot Preclude A Review Of That Decision On The Merits.

Congress, by express terms in the Bankruptcy Act, (11 U.S.C.A. 606, 11 U.S.C.A. 47, and 11 U.S.C.A. 521, heretofore quoted), granted your Petitioner, the Woodmar Realty Company, a valuable right of appeal.

The Supreme Court will and does grant certiorari to protect a party litigant in its right to a "Day in Court":

> "Applying this doctrine to the facts and circumstances which we have previously stated, we are of opinion that it inevitably results that the effect of the action of the circuit court of appeals was substantially to *deny* to the plaintiffs in error in that court, petitioners here, *their day in court;* in other words, was equivalent to *condemning them without affording them an opportunity to be heard.*
>
> * * * As it is patent from the statement we have made that *the only ground* upon which the power to issue certiorari could have been exerted was the *failure of the court below to consider the case before it*, we think this record *presents an exception* to the general rule of procedure above referred to. In other words, in a case like this we think the judgment of the circuit court of appeals *must be reversed*, and the case be *remanded* to that court, to the end that *the duty to hear and decide it may be performed.*" (Our emphasis).
>
> *Lutcher & Moore Lumber Co.* v. *Knight* (1910) 217 U.S. 257, 30 S. Ct. 505, 509-510

See also *Albin* v. *Cowing Pressure Relieving Joint Co., et al*, (1942) 317 U.S. 211, 212, 63 S. Ct. 170, 171; *Parissi* v. *Telechron, Inc. and General Electric*, (1955) 349 U.S. 46, 75 S. Ct. 577.

Dismissal, without a hearing on the merits, is rarely justified by any Court:

> "* * * Dismissal with prejudice is a *drastic sanction* to be applied only in *extreme* situations. *Gill* v. *Stolow*, 2 Cir., 1957, 240 F. 2d 669; *Producers Releasing Corp. de Cuba* v. *PRC Pictures*, 2 Cir., 1949, 176 F. 2d 93, and here the preclusion order seems an ample penalty for any lack of cooperation on plaintiff's part.
>
> We hold that *dismissal was improper.*" (Our emphasis).
>
> *Syracuse Broadcasting Corporation* v. *Newhouse*, (2 Cir. 1958) 271 F. 2d 910, 914.

As this Court has aptly stated:

> "* * * These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to *dismiss* an action *without affording a party the opportunity* for a hearing on the merits of his cause. * * *" (Our emphasis).
>
> *Societe Internationale etc.* v. *Rogers* (1958) 78 S. Ct. 1087, 1094.

Viewing this peculiar, unnatural, abortive dismissal and its unnecessary and unjust results, it seems to fall far short of the basic requirements of "due process of law" under the *Fifth Amendment*:

> "In judicial proceedings, due process of law means law in *its regular course* of administration through courts of justice, in accordance with the fundamental principles of free government. * * * (our emphasis).
>
> 16A C.J.S., Constitutional Law, Sec. 567, p. 541.

To permit a District Court to violate a mandate of a Court of Appeals results in an obvious denial of the rights of the party who has been compelled to appeal in

order to obtain the mandate. The subsequent vacating of the approval of the 102 settlement stipulations destroyed the rights granted the parties under the 1960 mandate of the Court of Appeals. The fact that the District Court delayed action under the mandate for 4 years and then vacated the stipulations which it had previously approved under mandate but refused to consummate certainly is a matter upon which the Woodmar Realty Company is entitled to its "Day in Court" in the Court of Appeals.

C.

The Court Of Appeals For The Seventh Circuit Has Placed An Unwarranted Interpretation On The Right To Be Heard On Appeal Granted By The 1938 Chandler Act, 11 U.S.C. 47(a) And 606, In Conflict With Decisions Of Other Circuits.

This Court, in *Young* v. *Higbee Co.* (1945) 324 U.S. 204, at page 210, held in pertinent part as follows:

> "Furthermore, the right of appeal granted by a statute should not be interpreted in such way as to defeat rights clearly granted in other parts of the same Act. *Peck* v. *Jennes et al.*, 7 How. 612, 623, 12 L.Ed. 841. Potts and Boag appealed under Sec. 206 of the Chandler Act, which, *contrary to the general bankruptcy procedure, grants any stockholder or creditor the right to be heard on all matters* relating to corporate *reorganizations*. Courts have liberally construed this language as authorizing appeals."

Your Petitioner, as the Debtor, was summoned in and "heard" in the District Court on the subject of vacating its 102 settlement stipulations. Having been "heard" in the District Court, it is entitled to be "heard" on the merits in the Court of Appeals. To deny the right of appeal is to engraft a qualification upon *11 U.S.C. 606*

not intended by Congress and in violation of the expressed intention of Congress.

The above misconstruction of *11 U.S.C. 606* by the decision below likewise conflicts with decisions of the Courts of Appeals of the First, Second, Third and Ninth Circuits which construe this section as does the Supreme Court. *Gleason* v. *Carr* (9 Cir. 1955) 219 F. 2d 64, 67, and cases cited, *Horowitz* v. *Kaplan* (1 Cir. 1951) 193 F. 2d 64, 66, (in which the Securities & Exchange Commission filed an amicus curiae brief opposing narrow construction of the statute and opposing motion to dismiss the appeal, pp. 65-66). The decision below also conflicts with an earlier one in the Seventh Circuit which was in accord with the above cases. *In re: South State St. Bldg. Corp.* (7 Cir. 1944) 140 F. 2d. 363, 366-367.

II.

The Case Of In Re: V.I.D., Inc., 7 C.A. 1955 226 Fed. (2d) 113, Is Not Authority For Denying Your Petitioner Its Statutory Right Of Appeal.

The Court of Appeals, in its order of dismissal, cites the *V.I.D.* case, *supra*, as authority.

In the *V.I.D.* case, the appellant was given a full hearing on the merits and the dismissal occurred following briefing and a full hearing in the Court of Appeals.

The *V.I.D.* case did not involve an appeal by a Corporate Debtor. Further, in the instant case, that the Woodmar Realty Company is, in fact, a "party in interest" is established by the undisputed facts appearing in the record as well as under the law of the case as established in two earlier appellate decisions.

To permit the dismissal by the Court of Appeals to stand will not only deny your Petitioner its day in Court as granted by Congress, but will authorize a most unwise departure from the orderly rules of procedure to the detriment of other future appellants in the Seventh Circuit.

Wherefore, Petitioner respectfully prays that this Court may issue its Writ of Certiorari to bring up and review this case, whereupon the judgment of the Court of Appeals may be reversed and your Petitioner given its day in court on the merits in the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

OWEN W. CRUMPACKER,
HAROLD ABRAHAMSON,
RICHARD P. KOMYATTE,
MILTON K. JOSEPH,
Attorneys for Petitioner.

APPENDIX "A"

UNITED STATES DISTRICT COURT

Northern District Of Indiana
Hammond Division

In the Matter of

WOODMAR REALTY COMPANY, a corporation, No. 3151

Bankrupt.

OPINION AND ORDER.

On July 21, 1961, pursuant to the direction of the Court of Appeals, this court entered an order approving compromise settlements arrived at by the bankrupt, Woodmar Realty Company, and the holders of 102 Class 2 claims and 3 general claims. At that time the validity of the bankrupt's objections to the remaining Class 2 claims, excepting the test claim, Claim No. 441, had not been decided. Since that date the court has held that all of the bankrupt's objections to the remaining Class 2 claims are without merit and 179 uncompromised claims have been allowed in the amounts allocated to them in the trustee's final report. (See the court's opinions of May 20, 1963 and September 23, 1963 and orders entered pursuant to those opinions.) The orders allowing those claims in specific amounts all provided that they were entered without prejudice to the rights of the claimants to claim and prove their rights to additional amounts should the settlements approved in 1961 have made additional funds

available for payment of lien claims in the rolls involved in their claims.

After the court had ruled on Claim No. 441 and the bankrupt's objections thereto, and on September 6, 1962, a petition was filed on behalf of the claimants in Claims Nos. 539, 521 and 414, settled claims, to redocket those claims. On January 11, 1964, after the court had allowed the 179 uncompromised Class 2 claims, the trustee filed a petition for instructions regarding certain problems created in the administration of this estate by reason of the 102 settlements. Thereafter, on January 22, 1964, a petition was filed on behalf of the claimants in Claims Nos. 398, 399, 400, 455 and 456 to vacate and set aside approval of their compromise settlements of those claims and to redocket and approve those claims. A hearing on those petitions was scheduled for and held on February 28, 1964. Notices of hearing were sent to all parties in interest and to the bankrupt, which is not a party in interest,[1] together with copies of the trustee's petition.

When the petitions filed September 6, 1962 and January 22, 1964 came on for hearing, counsel for the trustee informed the court that he had received letters from two attorneys representing ten other settling claimants, the claimants in Claims Nos. 387, 345, 468, 465, 467, 460, 459, 470, 100 and 150, asking that the settlement agreements made by their clients be set aside. Copies of those letters were filed with the court. Counsel for the trustee further

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[1] See order of September 23, 1963.

informed the court that the holders of the eighteen settled claims affirmatively seeking relief from their settlements held in excess of 40% in amount of the total claims compromised.

Counsel for the claimants in Claims Nos. 539, 521 and 414, in the petition filed September 6, 1962, stated that the settlement agreements with those claimants had been rescinded with the consent of Woodmar, and attached correspondence indicating that those claimants agreed to the settlements in the belief that they would be paid immediately and indicating further that Woodmar agreed to a recission of the settlements if the claimants agreed to try their claims. No objection to the petition was filed by any party in interest. Neither was any objection filed by the bankrupt, but at the hearing on February 28, 1964 counsel for the bankrupt stated that he objected thereto on substantially the same grounds as he objected to the petition of January 22, 1964 which grounds we shall hereinafter discuss.

Counsel for the claimants in Claims Nos. 398, 399, 400, 455 and 456, in his petition filed January 22, 1964, stated that under the terms of their agreements with the bankrupt, his clients were to be paid the amount of their settlements within thirty days from the date the settlements were approved, that the bankrupt had no right or authority to represent that the settling claimants would be paid by the trustee within thirty days from the date of approval, and that the compromises were obtained under a misapprehension of law as to when they would be paid. This petition too was not objected to by any party in interest, but the bankrupt filed objections on the day of

the hearing claiming (1) that the attorney filing it was not a party,[2] (2) that this court could not disturb the mandate of the Court of Appeals ordering approval of settlements, and, (3) that since the petitioners had not appealed from the order of July 21, 1961 approving their settlement agreements, the court is without jurisdiction to entertain a petition to vacate that order.

Counsel for the claimants in Claims Nos. 387, 345, 468, 465, 467, 460, 459, 470, 100 and 150, whose letters to the trustee were presented to the court on February 28, 1964, stated in those letters that compromises were entered into by their clients in the belief that the settlement amounts would be paid within a reasonable time and, since no payment within a reasonable time had been made, those compromises or the order approving those compromises should be set aside.

It is unquestionable that the claimants in the aforementioned claims, and all claimants who entered into the settlement agreements with the bankrupt in 1957 and 1958, which were approved on July 21, 1961, settled their claims with the understanding that the amounts of their settlements would be paid to them within a reasonable time. Provisions contained in many of the settlement agreements themselves evidence this fact, as does the following quotation contained in a letter sent by counsel for the bankrupt to Class 2 claimants as a part of the

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[2] Since the attorney filed the petition and sought relief on behalf of his clients, claimants herein, this objection is absurd and need not be considered.

bankrupt's settlement negotiations: (See Exhibit D attached to the court's opinion of February 11, 1960)

> "The compromise would take the form of a stipulation between the parties, approved by the Court, with an order against the Trustee to immediately disburse to the claimant, by check, the sum agreed upon. (We are fully aware of the fact that compromise negotiations would be futile unless the claimant were to receive immediate payment of the amount agreed upon.)"

However, when the settlement agreements were approved by this court on July 21, 1961, pursuant to the direction of the Court of Appeals, this court was unable to order payment to the settling claimants of the settlement amounts, primarily because the bankrupt had failed to demonstrate that funds were available in this estate out of which such payment could be made without prejudice to the rights of others.[3] The bankrupt thereafter filed a petition asking in part that the trustee be directed to pay the settling claimants their settlement amounts, which petition was denied. (See Opinion and Order dated January 10, 1962) Its appeal from that denial was dismissed by the Court of Appeals.

The settling claimants now seeking relief, and all settling claimants, entered into settlement agreements, ap-

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[3] The only document then in the record indicating that settlement amounts could be paid without prejudice to the rights of anyone was the trustee's amended final report, which the bankrupt challenged as fraudulent.

proximately six years ago, under the misapprehension created by the bankrupt that the trustee could be ordered to pay their settlement amounts immediately. As counsel for the bankrupt themselves recognized, prompt payment was a major consideration for the settlements. The settling claimants here seeking relief correctly contend that, there being a failure of that consideration, the settlement agreements should be set aside. That same reasoning dictates that in equity the settling claimants who have not sought relief should be relieved of their settlements since a similar failure of consideration existed as to them. We shall hereinafter discuss the fact that the nonsettling claimants, who are the only persons benefitted by the settlements, have no objection to such relief being granted.

At the hearing of February 28, 1964, counsel for the bankrupt which, as we have stated, is not a party in interest, filed a motion to strike the trustee's petition for instructions, contending that the petition presented no issue and was inaccurate and that the court could not instruct the trustee to act contrary to law. In his argument, counsel indicated that it was his position that a trustee could not request instructions of the court and that any trustee who could not perform his duties without seeking instructions should resign. Although the bankrupt is not a party in interest in these proceedings and has no standing to be heard regarding the trustee's petition for instructions, we have given consideration to its motion and the arguments of its counsel and find them to be without merit. Trustee obviously may seek instructions from the court where necessary; petitions for in-

structions are not designed to raise issues; the bankrupt has pointed to no inaccuracies in the petition; and it is not this court's intention to instruct the trustee to act contrary to law.

The facts relevant to the trustee's petition for instructions are as follows:

1. As a result of the settlements effected by the bankrupt, the 102 settled Class 2 claims would receive approximately $76,600 less than the amounts allocated to them in the trustee's amended final report.

2. The 102 settled claims involved bonds and coupons in 25 rolls[*] to which the trustee had recommended allocations of funds. Additional claims, which were not settled, were filed in these proceedings on other bonds and coupons in every one of those 25 rolls. In its opinion of September 23, 1963, the court considered all of the bankrupt's objections to those additional claims, and held them

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[*] For a discussion of the nature of the rights of holders of these bonds and coupons, issued pursuant to Indiana's Barrett Law, see this court's opinion of September 23, 1963.

to be without merit. The objections which the bankrupt had raised to the settled claims raise no issue which was not ruled upon by the court in that opinion.[5] All of the bankrupt's objections to settled claims are without merit and, if no settlement agreements had been approved, those claims would have been allowed in the amounts allocated thereto by the trustee.

3. Before this estate can be closed, the $76,000 saved by the settlements must be paid to the persons entitled thereto. *The bankrupt is not one of those persons.* The only persons who can benefit by reason of the settlement agreements and funds saved thereby are other Class 2 claimants with bonds and coupons in the same 25 rolls as the bonds and coupons held by settling claimants, or perhaps all Class 2 claimants whose claims were not

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[5] The only exception is one objection to Claim No. 398 in which the bankrupt stated that the original holder of the bonds and coupons involved in that claim was a fiduciary in these proceedings and that the claimant must prove that the fiduciary obtained the bonds and coupons prior to his appointment and, no such showing having been made, the claim must be disallowed. This objection is without merit for two reasons. First, the bankrupt raises no issue since it does not allege that the fiduciary acquired the bonds and coupons after his appointment. Absent such an allegation raising that issue, the claimant is not put to his proof. Second, an affidavit has been filed by the claimant as required by §249 of the Bankruptcy Act establishing that bonds involved in Claim No. 398 were acquired by the fiduciary prior to his appointment.

settled. None of those non-settling claimants have received payment in full, including interest, of their lien claims against Woodmar property, and, to the extent that additional funds are now available for payment of claims, they are entitled to additional payment.

4. Under the terms of most of the settlement agreements as corrected,[6] bonds and coupons held by settling claimants are to be or have been turned over to the trustee. Most of these bonds and coupons represent rights to a portion of a fund presently deposited in the Clerk's Office of the Lake County, Indiana, Superior Court, which fund is referred to as the "John Doe Trust".[7]

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[6] In many of its settlements, the bankrupt had attempted to provide that the bonds and coupons held by settling claimants be turned over to the bankrupt directly. When this provision was placed in scrutiny, however, its counsel admitted that it was improper for the bankrupt, using funds from the bankrupt estate, to acquire assets in its own behalf, and agreed that any bonds and coupons acquired should be transferred to the trustee.

[7] Many of these bonds and coupons, as of the commencement of these proceedings, represented lien rights not only on Woodmar property, but also on property owned by others. The funds realized in State Court foreclosure actions on sale of the property owned by others constitute the "John Doe Trust". Bondholders can and will recover in these proceedings only to the extent that their bonds represent lien rights against Woodmar property and must look to the John Doe Trust for payment to the extent their bonds represent lien rights against property of others.

(Appendix A)

5. Before this estate can be closed the trustee, in the proper performance of his duties, will have to liquidate the bonds and coupons turned over to him pursuant to settlement agreements, either by awaiting the distribution of the funds from the "John Doe Trust" to which he, as the holder of those bonds and coupons is entitled, or by disposing of those bonds and coupons for a proper consideration. The funds thus realized will then have to be distributed to the persons entitled thereto. As set forth in Paragraph 3, other Class 2 claimants, and not the bankrupt, are the persons entitled thereto.

In his petition, the trustee requested instructions as to the proper action to be taken in regard to the compromises, including those compromises which the settling claimants themselves have asked to be set aside, the disposition to be made of bonds and coupons acquired pursuant to the compromises, and the necessity of an auditing study to determine who was entitled to the $76,000 saving effected by the compromises.

At the hearing of February 28, 1964, 113 of the 179 non-settling Class 2 claimants, whose claims have been allowed and the claimants in Claim No. 441, were represented by their counsel. In addition, the trustee, counsel for the trustee, counsel for some of the settling claimants, and counsel for the bankrupt were present. We have already discussed the position taken by the bankrupt. Those counsel who spoke on behalf of any claimants all took the position that settlement agreements should be set aside and the claims of the settling claimants should be allowed in the amounts allocated thereto in the trustee's amended final report. Three considerations dictate that

this is the proper course, one being the desire to close these already over-ripe proceedings as expeditiously as possible, the second being the rights and equities of the settling claimants, and the third being the wishes of persons benefitted by the settlements.

I.

These proceedings are already over 23 years old. If the settlement agreements approved in 1961 are honored, it will be necessary to recompute the amounts allocated to claims to determine who is entitled to the $76,000 savings effected thereby and to the amount realized on bonds and coupons turned over to the trustee. (See Paragraphs 3 and 5 above) At the hearing, estimates were given as to the cost of such a recomputation, ranging from $10,000 to $25,000. No estimate of the time a recomputation would take was made, but our own knowledge of these proceedings and their complexities convinces us that the time involved would be substantial and probably would be several years. It is also impossible to predict how long the trustee might have to wait to realize any funds out of the John Doe Trust, should he have to await distribution of those funds,[8] or the amount of litigation in which he would have to become involved with respect thereto.

If the settlement agreements are set aside, on the other hand, the settled claims can be allowed in the amounts allocated to them in the amended final report,

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[8] Litigation giving rise to the John Doe Trust has been pending longer than these proceedings.

since all of the bankrupt's objections thereto have been held to be without merit when considered in connection with substantially identical claims in the court's opinion of September 23, 1963, and the bonds received by the trustee could be returned to the settling claimants. The amount and validity of all Class 2 claims will then have been established and, after a hearing is held on the amended final report and fees and expenses considered, this estate can be closed.

At the hearing of February 28, 1964, the only non-settling claimants expressing an opinion on this point stated that they would prefer early payment of their claims in the amounts in which the claims are now allowed —the amounts allocated to them by the trustee—to awaiting payment of those claims in a higher amount until a recomputation was made allocating to them the funds made available by the settlement agreements. They stated that, in order that this matter might be brought to an end in the foreseeable future, it was their desire that the settlement agreements be set aside and the claims of settling claimants be allowed in the amounts allocated thereto by the trustee. As stated before, the only persons who could be adversely affected by such a course of action are the non-settling claimants, none of whom oppose it.

II.

The Court of Appeals decision with respect to the settlement agreements was rendered before the test case, Claim No. 441, was disposed of, and before orders were entered allowing the remaining Class 2 claims after the bankrupt's objections thereto were held to be without

merit. The claims of the settling claimants are substantially identical with claims of non-settling claimants, which latter claims have now been allowed in the full amounts allocated thereto by trustee, yet the settling claimants, in the present situation, will receive an average of only approximately one-third of the amounts allocated to their claims. The non-settling claimants will reap the benefits of the settlements by distribution to them of the savings effected by those settlements in addition to the amounts in which their claims have presently been allowed.

At the hearing of February 28, 1964, the only non-settling claimants speaking through counsel to this point indicated that they believed it would be inequitable for them to reap the above described benefits at the expense of settling claimants when all claims had the same merit, and further indicated that they would prefer to waive those benefits, have the settlement agreements set aside, and have the settling claimants' claims allowed in the amounts allocated to them by the trustee.

In addition, as stated before, the majority of the settlement agreements provided for prompt payment from estate funds of the settlement amounts to settling claimants, a provision which, as it later appeared, the bankrupt was without authority to include. Compliance with this provision was impossible, and, as a result there has been a substantial failure of consideration.

III.

No non-settling claimant stated at the hearing of February 28, 1964 that he wished to have the settlement agreements enforced to preserve to himself the additional

funds he would secure thereby. On the contrary, all non-settling claimants taking a position stated, for reasons set forth above, that settlements should be set aside.

After thorough consideration of the aforementioned petitions, the positions of the parties with respect thereto and the record herein, it is our decision that for the reasons set forth above, the 102 settlement agreements arrived at by the bankrupt and Class 2 claimants and the order of July 21, 1961 approving those agreements must be set aside and those 102 Class 2 claims, to all of which no valid objections have been made, must be allowed in the amounts allocated to them in the trustee's amended final report. In arriving at this decision we are in no manner attempting to interfere with any mandate of the Court of Appeals.[9] The mandate directing

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[9] Since we have presided in these proceedings they have been before the Court of Appeals in the following appeals or petitions:

No. 12833 Woodmar, et al v. Hon. Robert E. Tehan, etc. Docketed November 14, 1959. Mandamus denied Jan. 21, 1960.

No. 12880 Woodmar v. Hon. Robert E. Tehan, etc. Docketed January 5, 1960. Mandamus denied Jan. 21, 1960.

No. 12883 Woodmar v. Hon. Robert E. Tehan, etc. Docketed January 7, 1960. Mandamus denied Jan. 21, 1960.

No. 13023 Woodmar v. McLean Docketed May 13, 1960. Judgment reversing Nov. 23, 1960.

approval of settlements has been complied with. Subsequent occurrences in this court and in the Court of Appeals compel the result we here reach, a result to which no party in interest objects.

No. 13118 Woodmar v. Hon. Robert E. Tehan, etc.
Docketed August 25, 1960. Petition dismissed Nov. 4, 1960.

No. 13121 Woodmar v. Hon. Robert E. Tehan, etc.
Docketed August 27, 1960. Mandamus denied Feb. 24, 1961.

No. 13123 Woodmar v. Hon. Robert E. Tehan, etc.
Docketed August 30, 1960. Petition dismissed Nov. 4, 1960.

No. 13215 Woodmar v. Walter A. McLean, et al.
Docketed December 3, 1960. Affirmed June 23, 1961.

No. 13369 Woodmar v. Hon. Robert E. Tehan, etc.
Docketed May 29, 1961. Petition dismissed June 13, 1961.

No. 13387 Woodmar v. Hon. Robert E. Tehan, etc.
Docketed June 14, 1961. Petition denied June 22, 1961.

No. 13401 Woodmar v. Hon. Robert E. Tehan, etc.
Docketed June 21, 1961. Petition denied June 23, 1961.

No. 13555 Woodmar v. Spencer, et al.
Docketed November 16, 1961. Dismissed June 13, 1962.

No. 13575 Woodmar, et al v. McLean, Etc.
Docketed December 15, 1961. Affirmed July 26, 1962.

No. 13579 Woodmar v. Julius, et al., etc.
Docketed December 20, 1961. Affirmed August 20, 1962.

No. 13713 Woodmar v. McLean, etc.
Docketed April 21, 1962. Dismissed July 20, 1962.

(Appendix A)

For the above and foregoing reasons, It Is Ordered:

1. That the court's order of July 21, 1961 insofar as it approved settlement agreements between the bankrupt and 102 Class 2 claimants be and it is hereby vacated and set aside.

2. That said 102 Class 2 claims be and they are hereby reinstated and the bankrupt's objections thereto, which have previously been held to be without merit, are denied.

3. That the trustee prepare orders allowing said 102 Class 2 claims in the amounts allocated thereto in the amended final report.

Dated, this 28th day of April, 1964.

/s/ Robert E. Tehan
U. S. District Judge

APPENDIX "B"

UNITED STATES DISTRICT COURT

Northern District Of Indiana
Hammond Division

In the Matter of

WOODMAR REALTY COMPANY, a corporation, No. 3151

Bankrupt.

OPINION AND ORDER.

On March 5, 1956, this court, Judge Luther M. Swygert presiding, granted motions by the trustee and various lien claimants to strike the objections of the bankrupt, Woodmar Realty Company, and its stockholders, to the allowance of claims and to the trustee's final report, on the ground that the bankrupt and its stockholders were not parties in interest. The bankrupt and its stockholders appealed from this order, which appeal resulted in a partial reversal by the Court of Appeals for this Circuit. (See *In the Matter of The Woodmar Realty Company* (1957) 241 F. 2d 768) A petition for rehearing was denied.

In its mandate, the Court of Appeals provided that appellants recover against the appellees, the trustee and numerous lien claimants, the costs of the appeal in the amount of $1926.40. Subsequently, some of the appellees filed with the Court of Appeals a petition to retax costs, which petition was denied on September 12, 1957. Thereafter, the bankrupt proceeded against two of the numerous lien claimant-appellees, John G. Phrommer and

Donald C. Gardner, to collect its judgment for costs. Woodmar's counsel stated that in singling out these two judgment creditors rather than proceeding against the trustee or other creditors, he was motivated (1) by a personal animus because of their alleged involvement in the early stage of this proceeding, and, (2) by a desire to have his judgment satisfied out of funds other than the bankrupt estate, which he expects Woodmar to succeed to.

On October 21, 1960, this court entered an order with respect to appellate costs, a copy of which is attached hereto and made a part hereof. Thereafter and on October 28, 1960, the two judgment creditors proceeded against paid the appellate costs plus interest in the total amount of $2350.20.

On October 30, 1963, a petition was filed by John G. Phrommer and Donald C. Gardner asking that the trustee be ordered to reimburse them the amount expended by them to satisfy the aforementioned judgment and to charge such reimbursement as a part of the costs of the administration of this estate. This petition came on for hearing on February 28, 1964, on which date the bankrupt filed written objections and its counsel voiced his objection. No other objection to the petition was made. The court has considered the petition and prior history of these proceedings relevant thereto and, despite the fact that the bankrupt is no longer a party in interest, has also considered the bankrupt's objections thereto, and is prepared to render its decision.

It is to be noted that the court, in its order of October 21, 1960, preserved to the petitioners the right to

seek equitable relief in respect to the matter of the costs of the appeal of the order of March 5, 1956. The reason for this is obvious. The petitioners were only two of the numerous appellees against whom the bankrupt could have proceeded and were no more responsible for the appellate costs than were the other appellees. Also, had the order of March 5, 1956 been affirmed, an advantage would have been realized not by the petitioners alone but by the claimants in each of the Class 2 claims still unpaid in these proceedings.

It is our opinion that the action of the appellees in seeking to have Judge Swygert's order of March 5, 1956 affirmed by the Court of Appeals was actually taken for the benefit of all Class 2 claimants, and was an attempt to spare those claimants the necessity of resisting the bankrupt's objections to their claims.[1] The appellate costs which the petitioners have paid should therefore, in equity, be shared by all class 2 claimants, excepting those whose claims are allowed in sums less than $25.00.

For the above and foregoing reasons,

It Is Ordered:

1. That the trustee reimburse the petitioners the sum of $2350.25 paid by them as costs of appeal from the order of March 5, 1956.

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[1] All of the bankrupt's objections to Class 2 claims have now been held by the court to be without merit.

(Appendix B)

2. That when the court orders payment of the Class 2 claims, the trustee determine how many of those claims exceed $25.00 and deduct from such claims their fractional share of the $2350.20, paying the claimants only the remainder.[3]

Dated, Milwaukee, Wisconsin, this 28th day of April, 1964.

/s/ Robert E. Tehan
U. S. District Judge

UNITED STATES DISTRICT COURT

Northern District Of Indiana
Hammond Division

In the Matter of

WOODMAR REALTY COMPANY, a corporation, No. 3151

Bankrupt.

ORDER.

On March 5, 1956, this court, Judge Luther M. Swygert presiding, granted motions by the trustee and various lien claimants to strike the objections of the bankrupt, Woodmar Realty Company, and its stockholders, to the allowance of claims and to the trustee's final report, on the ground that the bankrupt and its stockholders were not

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[3] For example, if 200 claims are entitled to more than $25.00, each of such claims will be charged with 1/200 of the appellate costs.

parties in interest. The bankrupt and its stockholders appealed from this order, which appeal resulted in a reversal by the Court of Appeals for this Circuit (See *In the Matter of The Woodmar Realty Company* (1957) 241 F. 2d 768). A petition for rehearing was denied.

In its mandate, the Court of Appeals provided that appellants recover against the appellees, the trustee and numerous lien claimants, the costs of the appeal in the amount of $1926.40. Subsequently, some of the appellees filed with the Court of Appeals a petition to retax costs, which petition was denied on September 12, 1957. Thereafter, the bankrupt proceeded against two of the numerous lien claimant-appellees, John G. Phrommer and Donald C. Gardner, to collect its judgment for costs. On September 26, 1957, these two judgment creditors filed a petition for an order requiring the trustee to pay costs, to which petition the bankrupt objected, and on October 5, 1957, the trustee filed a petition for instructions concerning payment of costs.

The bankrupt has attempted to levy upon the stock of the two above-named judgment creditors in two Indiana corporations, of which they are officers, University Gardens Corporation and Dell Homes, Inc. On advice of counsel, the two judgment creditors have refused to permit the United States Marshal, Roy M. Amos, through his deputy, access to the corporate stock registers of those corporations.

On December 9, 1957, a petition was filed on behalf of the United States Marshal seeking an order directing the judgment debtors, Phrommer and Gardner, as officers

of the two above-named corporations, to produce the corporate records of these corporations so that a levy could be made upon their stock.

Woodmar's counsel, Mr. Crumpacker, has stated in open court, that in singling out these two judgment creditors rather than proceeding against the trustee or other creditors, he was motivated (1) by a personal animus because of their alleged involvement in the early stage of this proceeding, and, (2) by a desire to have his judgment satisfied out of funds other than the bankrupt estate, which he expects Woodmar to succeed to.

In view of the fact that the judgment creditors, Phrommer and Gardner, have sought and been denied relief from the Circuit Court of Appeals for this Circuit, and in further view of the principle that a judgment creditor can elect to proceed against one, or all, or any of the judgment debtors, the court has no alternative but to grant the relief sought by the United States Marshal. It would appear, however, that since these judgment debtors have not been shown to be without financial responsibility, but on the contrary appear to be long-time residents of the community with substantial assets, the relief sought by the United States Marshal should be postponed for ten days from the date hereof, thereby giving the two judgment debtors an opportunity to satisfy the judgment without being subjected to the harassment of producing books and documents or submitting to other means of discovery.

(Appendix B)

For the above and foregoing reasons,

It Is Ordered:

1. That the petition of Roy C. Amos, United States Marshal filed December 9, 1957, for an order directing John G. Phrommer and Donald C. Gardner, as officers of University Gardens Corporation and Dell Homes, Inc. to produce the corporate records of said corporations necessary in making a levy on their stock in that corporation be and the same is hereby granted, and said officers are directed to so produce said records.

Provided, however, that this order be stayed until ten days from the date hereof, and,

Provided further that if the aforesaid judgment is fully satisfied within such period ten days from the date of this order, this order will be of no force or effect.

Provided further, that nothing herein contained be construed as barring the judgment creditors, John G. Phrommer and Donald C. Gardner, from seeking equitable relief hereafter in this proceeding in respect to this matter of costs.

Dated, this 21st day of October, 1960.

/s/ Robert E. Tehan
U. S. District Judge